



OFFICE OF THE POLICE COMMISSIONER

ONE POLICE PLAZA • ROOM 1400

April 20, 2009

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Sean McCaffery**
Tax Registry No. 918564
105th Precinct
Disciplinary Case No. 83425/07

The above named member of the service appeared before Assistant Deputy Commissioner Robert W. Vinal on June 11, 2008 and was charged with the following:

DISCIPLINARY CASE NO. 83425/07

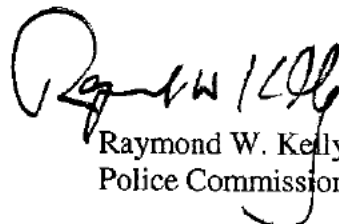
1. Said Police Officer Sean McCaffery, assigned to the 105th Precinct, while on duty, at about 0315 hours on May 11, 2006, at [REDACTED] County, did abuse his authority as a member of the New York City Police Department in that he searched the car of an individual known to this Department without having the legal authority to do so.

PG 203-10, Page 1, Paragraph 5

GENERAL REGULATIONS

In a Memorandum dated October 7, 2008, Assistant Deputy Commissioner Vinal found Respondent McCaffery GUILTY of the sole Specification. Having read the Memorandum and analyzed the facts of this instant matter, I approve the finding, but disapprove the penalty.

The Respondent's actions in this matter were deemed by the trier of fact to be improper. Therefore, Respondent McCaffery is to be issued a Schedule "B" Command Discipline, PLUS forfeit one (1) Vacation day, PLUS receive reinstruction from his Commanding Officer regarding Legal Bureau Bulletin No. 5, Vol. 22 - "Vehicle Searches."


Raymond W. Kelly
Police Commissioner



POLICE DEPARTMENT

October 7, 2008

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Sean McCaffery
Tax Registry No. 918564
105 Precinct
Disciplinary Case No. 83425/07

The above-named member of the Department appeared before me on June 11, 2008, charged with the following:

1. Said Police Officer Sean McCaffery, assigned to the 105 Precinct, while on duty, at about 0315 hours on May 11, 2006, at [REDACTED] did abuse his authority as a member of the New York City Police Department in that he searched the car of an individual known to this Department without having the legal authority to do so.

P.G. 203-09, Page 1 – Paragraph – PUBLIC CONTACT

The Department was represented by Nancy Lichtenstein, Esq., Department Advocate's Office, and the Respondent was represented by John Tynan, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty as charged.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Tamicka Williams as a witness and offered the statements of Rodney Dunn and Demetris Leach.

Tamicka Williams

Tamicka Williams, who resides in [REDACTED] and has been employed as a counselor at [REDACTED] group home for the past four months, testified that on May 11, 2006, at around 3:00 a.m., she was sitting in her car which was parked in front of her house on the corner of [REDACTED]. She observed a "blue Chrysler" being pulled over by police officers in an Emergency Service Unit truck. She stated before the Chrysler was pulled over, "It made a right on [REDACTED] and it was going towards Linden and Springfield and then it made like a U turn by the McDonald's right there, so it was like going to McDonald's, but it was making a U turn."

After the police officers pulled the car over, she observed them pull a passenger out of the car "and he hit his head." The passenger began screaming, "I was sleeping! I was sleeping!" Williams then "jumped out" of her car and walked over to the Chrysler. When the officers told her repeatedly, "Get on the sidewalk," she answered, "No. I am not getting on the sidewalk." The passenger was taken to the ground by the officers and handcuffed. After about five minutes, the officers pulled him up and put him on the car seat. The officers then told the driver to get out of the car and he put his hands out and he said, "I am getting out. I don't have nothing on me." They opened up the door for him to get out. When he got out they handcuffed him and began to search him. The passenger

was screaming, "I need an ambulance! I need an ambulance!" He said that his eye was burning. The driver also told the officers that the passenger needed an ambulance. She observed four officers at the scene and two police vehicles: one truck and one car.

When she was asked, "What happened after the driver had said that the passenger needed an ambulance?" She stated, "That's when the officer continued to tell him to shut up. And they started to, they began to search the car. The bald headed officer started to search the front of the car and the back of the car. The other officer from the car, that's when he went and opened up the trunk and they searched the trunk." She stated, "He was inside." When she was asked, "Where was this officer when you observed him search the trunk?" She responded, "He went inside the car and pressed the button to open it up. The officer...that came out of the car...searched the car. It was the officer with black hair. He had the driver. The officer "that was bald headed. He was the one that opened up the car to search the trunk." When she was asked, "Do remember anything else about what the officer looked like who searched the trunk?" she stated, "He was white."

When she was asked, "How long was he searching the car for?" She stated, "For like five minutes. He was talking to him. He was talking to the driver about the stuff in the trunk. He had stuff for his radio, I guess, he bought speakers and stuff, so they were talking about like where did he buy it and where did he get it...and then he continued to search the trunk and then...he told him there was nothing in there...that's when the black officer told him that he was just giving him a ticket because, I guess, his insurance was messed up."

When she was asked how the officer who searched the trunk had performed this search she stated, "He was putting his hands, and tried to find out what was in the trunk,

so he had to put his hands in there like he was moving the stuff around to see what was in there" as he was standing "in front of the trunk." She did not know either of the occupants of the Chrysler nor had she seen the occupants before that day. She gave her contact information to a sergeant at the scene.

On cross-examination, when she was asked why she was in her car at 3:00 a.m., she stated that she had just come back from seeing her boyfriend. She spotted the officers before they stopped the car when they were parked in a car wash. She recalled that, "When I was driving up they were actually - - I was about to hit them actually when I seen them because in the entrance to the [REDACTED] you cannot - - it's a one way street to go up, so when they came out of the drive thru they actually almost hit me because they was going through the one way to cross over to the car wash. That's how I knew they were parked in the car wash because they went directly in the car wash to park there." She recalled that the Chrysler had four doors. When she was asked, "Does it have a trunk or a hatch back?" She answered, "A trunk."

She recalled that the officers handed a ticket to the driver which she believed "was for insurance because they kept talking about the insurance." When she was asked whether the officer who looked inside the trunk used his hands to look around the trunk area, she responded, "Yes, he was using his hands to go inside the trunk." When she was asked, "Did he go into the passenger part of the car?" she answered, "No, the black officer did." She testified that the front passenger seat was reclined and that "it was pretty far back."

When she was asked if she saw anything in the back seat of the car, she stated, "No, I didn't get that close." When she was asked how long the officer was looking in

the car, she stated about "two to five minutes because he was talking to him back and forth about the stuff in the car. The driver he was right there. The driver was handcuffed between the passenger and the trunk." She testified that the handcuffed passenger was sitting in the car because after the officers lifted him off of the ground they told him to sit there and that "there was a white bald headed officer with him and the black haired officer was with the driver. Nobody left nobody because there was an officer for each individual." When she was asked if the windows on the car were tinted, she answered, "I don't think so. I don't remember it."

Rodney Dunn

A tape-recorded interview of Rodney Dunn was conducted at the Civilian Complaint Review Board (CCRB) [Department's Exhibit (DX) 2]. When Dunn was asked what had occurred at about 3:15 a.m. on May 11, 2006, at the intersection of

_____ he stated that he was asleep in the front passenger seat of Demetris Leach's car as Leach was driving on _____

He “woke up” to discover that someone was “pushing on my back, pushing my head into the street, into the concrete and stepping on my leg.” He exclaimed, “Yo, stop playing, stop playing,” because initially he “thought it was my friends, I thought they were just playing.” He realized they were police officers when they rear handcuffed him as he was face down on the pavement. They then picked him up off the ground and sat him down in the passenger seat. He saw “a whole bunch of police.” He asked them, “Why do I got handcuffs on? What’s going on?” An officer told him, “Shut the fuck up. I ain’t got to answer to you. You answer to me.” He asked, “Why is my face burning?”

The officer responded, "I'm not going to tell you again." He asked the officer, "Can you just tell me what's going on? Like my rights haven't been read. I don't know what's going on. I'm sleeping and I wake up and I'm on the floor and my head is ringing and my face is burning...can you call an ambulance please?" The officer told him, "I'm not calling no ambulance."

Dunn then "tried to move out of my handcuffs" because "my handcuffs was tight." When he asked the officer, "Can you loosen these 'cuffs? He responded, "You're making it worse for your friend then you. The handcuffs are going to come off. You just shut your mouth. If you don't shut your mouth, you're going to make them stay on longer."

The officer walked around to the driver's side of the car where other officers were removing Leach from the driver's seat. Because Dunn's "ankle was messed up," he "fell on the floor," and the officer told him, "Oh, you're trying to run." Dunn told him, "No. I'm asking you can you loosen these cuffs. These 'cuffs is messed up." The officer then loosened the handcuffs. The officer accidentally removed the handcuff that had been around Dunn's left wrist, but he was not aware of this because Dunn kept both of his hands behind his back.

The officer continued to tell Dunn, "Shut up, you're just trying to run, you just tried to run." Dunn told the officer that he was unable to run because his ankle was swollen. Dunn then showed him that his left hand was free. The officer then removed the other handcuff from Dunn's right wrist and walked around to the driver's side. He whispered something to another officer, they took the handcuffs off of Leach and then left.

Dunn told Leach to call for an ambulance. When the ambulance arrived five to seven minutes later, a "squad car" also pulled up. An officer got out and said he was a sergeant. Then another "squad car" pulled up and the same officers who had just left the scene got out of the car. He described the officers as "a black officer and a white officer in an ESU unit truck and two white officers in the squad car. The ESU unit was the guy who took the handcuffs on me, that was stepping on my leg, he never came back. He left in the big truck, him and the black officer which was the guy who wrote the ticket up, he left and then both of them left but only the two white cops came back. And he walked up to me like, 'You okay? What's going on? What happened?' I'm like, 'What do you mean what happened? You was just right here!'" The officers put Dunn inside the ambulance.

Because the officers told the ambulance not to leave, Dunn was held at the scene for "an hour before I got to the hospital." When he complained, the officers told him, "Shut the fuck up." During this time, "All of them were searching the car. Every last one of them was taking everything out of the glove box, on the floor and all that." Since Dunn "was sitting right there on the seat," the officer, a "short white guy" wearing "glasses," who was "taking the stuff out of "the glove compartment "and throwing it on the floor" dropped some of the contents on Dunn's lap. Dunn stated that the officers looked through "the whole car, in the back, they looked in the trunk, they looked under the seats..." When he was asked, "Did you see which officer went into the trunk?" he answered, "Nah, I don't remember."

Demetris Leach

A tape-recorded interview of Demetris Leach was conducted at CCRB (DX 1).

When Leach was asked what had occurred at about 3:15 a.m. on May 11, 2006, at the intersection of [REDACTED] he stated that after he and his friend Dunn came out of a [REDACTED] Dunn fell asleep in the Dodge Magnum. As Leach entered the left lane to make a left turn, "a big old truck with no lights on...cut me off right there in the middle of the road." Suddenly police officers "hopped out" and "tried to pull me out the window" as they told him to get out of the car but, because his seat belt was still buckled, he couldn't get out of the car. The officers accused him of "resisting arrest." The officers then "opened the door, take me out of the car, throw me up against the car. After that they go into my pockets and search and me...and take my money out of my pocket and put it on the dashboard. They searched my car. They see my tools in the back of my car. I had a radio that I'm about to put in my car. They asked me what I'm doing with this radio and then they called my mother on my phone and they asked my mother, "Whose car is this?"

As Leach was standing outside handcuffed up against their car, he told them, "My friend is sleeping in the car." They told him "shut the fuck up" and they grabbed Dunn, woke him up, and threw him to the ground where he was also handcuffed.

The officers found Leach's girlfriend's ID card which she had accidentally left behind in his car. They asked him what he was doing with her ID and they used his cell phone to call her. She confirmed that he was her boyfriend and that she had been with him earlier. He heard Dunn call out, "Can you call an ambulance for me?" He later saw

scars on his face. The officers then “gave me a ticket for no registration” and “they just got back in their car and they left.

Dunn asked Leach to call for an ambulance and so he called 911 on his cell phone. He told the operator that he and his friend had “been harassed by the police and my friend is on the ground, he’s bleeding...” Soon after that, Leach saw “the same officers come back now to the scene...” When an ambulance arrived at the scene, Dunn was placed on a stretcher and a technician “put bandages around his head.” One officer told Leach “to get my friend out of the ambulance or else my insurance is going to go up, like it was a car accident.” But “the ambulance people told” Leach, “Your insurance ain’t going to go up because it’s not a car accident. This is what they did to you.”

When Leach was asked, “You said they went in the back seat of the car?” He answered, “Yeah, they went in the back. Not in the back seat. They went to the back seat. They searched back there. Then they went to the back. A Dodge Magnum you got this part that...you can lift up the back and it comes up...the trunk and they’re back there...I do electrical. So they see all these tools in the bag and a TV...” and...he found the TV...” Leach stated that “just one” officer opened and searched the rear of the Dodge Magnum “and...he found the TV...”

The Respondent’s Case

The Respondent testified in his own behalf.

The Respondent

The Respondent, who has been assigned to patrol duties at the 105 Precinct since 1997, testified that at about 3:00 a.m. on May 11, 2006, he and his partner were performing directed patrol duties when they observed an Emergency Service Unit (ESU) truck at the intersection of [REDACTED] which is about two blocks south of the intersection of [REDACTED]. He saw the ESU truck follow a Dodge Magnum station wagon which had made an illegal U-turn in a business district on a red light and then had proceeded northbound on [REDACTED] at an excessive rate of speed. The Respondent assisted the ESU officers in stopping the station wagon by pulling up on the driver's side of the station wagon. The driver and the lone passenger were ordered out of the station wagon. The Respondent and his partner searched and handcuffed the driver who, once his arm was unhooked from the seat belt, "was no problem." The passenger "resisted" the ESU officers who removed him from the passenger side of the station wagon. He was screaming and yelling.

The Respondent told his partner to stay with the driver while he moved around the station wagon to assist the ESU officers and secure the passenger. He was then rear handcuffed outside the station wagon and then placed into the front passenger seat facing outward with his feet outside the open front passenger's door. The passenger "continued to get up and paced back and forth." The Respondent searched the area in the front seating area near where the passenger was seated. Because the front passenger seat was almost fully reclined backwards, he also searched "the back seat and the rear area of the vehicle" because the passenger had "full access to the storage area" in the rear of the

station wagon. He searched the rear area behind the tail gate of the vehicle by depressing a release on the back door which opened the rear hatch causing the glass portion to flip up and the tail gate portion to come down. The Respondent then “leaned over and conducted a visual and physical inspection” of the area inside the tail gate which took less than one minute and which revealed that “items” and “objects” the Respondent had noticed through the car’s heavily tinted windows “were some tools and two radio systems.” The Respondent testified that his concern that something might be secreted inside the car was raised by the passenger’s unwillingness to get out of the station wagon and his belligerence. The Respondent testified that he was aware that “that model” of station wagon had been used in committing late night convenience store robberies in New York City although he could not recall whether any of those robberies had been committed within the 105 precinct.

The Respondent removed his handcuffs from the driver and he and his partner left the area because the ESU officers, as the “initiating” officers were in charge of the scene.

On cross-examination, the Respondent reiterated that the station wagon was a hatch back and did not have a trunk. He was confronted with a statement he made at his August, 2006, CCRB interview. When he was asked, “You said you went through the car. What did you do exactly?” He answered, “I only remember looking in the trunk and seeing a few stereo systems.” On re-direct examination, the Respondent’s memory was refreshed with another statement he made at his August, 2006, CCRB interview. When he was asked at that interview, “What was the reason for searching that trunk?” He had answered, “It’s a station wagon. It’s not really a trunk so much as a rear-end hatch area similar to, you know, a hatch back that would be opened. It’s not an enclosed trunk.”

The Respondent testified that “there was a release . . . located . . . on the back gate on the very end of the car, the exterior” which was not locked. He pulled the latch and then the hatch opened. When he was asked why he had opened the hatch, he answered, “To be able to see better the items that I couldn’t make out due to the windows being tinted to about 50 times below the legal limit of State of New York. I couldn’t make that out what they were and for my safety and for the other officers safety I needed to see what those items, in fact, were.” When he was asked what kind of objects he was seeking, he answered, “Weapons and contraband. Again the front passenger seat was fully reclined to allow easy access to the vehicle. And this sort of vehicle had been used in armed robberies at convenience stores in the immediate area, so my level of any kind of suspicion, as well as observing the vehicle commit numerous infractions as (well as) speeding off from the police.”

He testified that “the passenger is both seated” in the front passenger seat “and pacing back and forth” from the “front to the rear of the vehicle...he kept getting up” and “he was continually getting out of the seat pacing back and forth along the vehicle.”

When he was asked whether he had opened the hatch specifically so that he could look for contraband, he answered, “To look and to determine what the items were that I could not make out, I guess, the shape of it as the tint was excessive. I couldn’t make out what exactly it was in the car or something could have been dumped that’s not in plain view but placed.” When he was asked whether he had believed that the station wagon was going to be taken into police custody and vouchered, he answered, “That had not occurred to me one way or the other.”

FINDINGS AND ANALYSIS

The Respondent is charged with having abused his authority by wrongfully and without just cause searching a car without having the legal authority to do so.

This charge poses two questions: Did the Respondent conduct a search of a car? If so, under the circumstances presented, did the Respondent have any valid legal basis to conduct the specific search he performed? Because I find that the first question must be answered in the affirmative and the second question in the negative, I find the Respondent Guilty as charged.

In reaching this finding, I have not relied on the testimony of Tamicka Williams or the statements made by Rodney Dunn and Demetris Leach. I need not credit any of their factual assertions because this finding of guilt can be squarely based solely on the statements the Respondent made during his interview at CCRB and during his testimony at this trial which establish that the Respondent searched an enclosed area of a vehicle in the absence of any legal justification to conduct such a search.

The initial question to be answered is whether the Respondent conducted a search of the rear interior area of the Dodge Magnum station wagon. The Respondent testified that he went to the rear of the station wagon and attempted to peer into the enclosed rear area of the vehicle by looking through the glass window located on top of the hatch gate. Although he was able to make out that there were "objects" inside the rear of the vehicle, he could not determine what these "items" were because the glass on the hatch window was heavily tinted. He decided to open the rear hatch and he did so by pulling on the rear gate's latch handle. He then opened the unlocked hatch and, as a result, he was able to

examine the rear interior area of the vehicle and ascertain that the objects inside the rear gate of the vehicle consisted of sound system components.

Although at his CCRB interview the Respondent initially described the area of the car he had opened as “the trunk,” later during this interview, and at this trial, he explained that this station wagon did not have a trunk and that he had actually opened the rear hatch gate of the vehicle. What is not disputed is that this hatch gate was closed. Therefore, the area behind the gate constituted an enclosed, albeit unlocked, interior area of the vehicle. By opening the hatch gate, the Respondent was physically intruding into an enclosed area of the vehicle.

Having determined that the Respondent conducted a search of a vehicle, I now turn to the question of whether, under the circumstances presented, the record contains any legal basis which would justify this search.

The Respondent testified that he performed this search both for his own safety and for the protection of the other members present at the scene. He contended that even though the driver and the only passenger were both in handcuffs at the time he opened the rear hatch, he, nonetheless, decided to search the rear interior area of the vehicle because he “needed to see what those items in fact were” because they might be “weapons.” He further testified that because the officers were allowing the handcuffed passenger to sit in inside the front seat of the car and to move around outside the car, he became concerned that the passenger might lunge for a weapon secreted behind the closed hatch.

I reject the Respondent’s purported safety justification for this search because it is based on his contention that the rear-handcuffed passenger posed a continuing threat to the officers when he was seated in the front seat of the car, facing outwards, with his feet

outside the car, and/or when he was outside the car pacing back and forth. The Respondent's claim that the passenger was physically capable of lunging for a weapon located in the rear of the station wagon behind a closed hatch, is not convincing. I find that one of the answers the Respondent provided during his trial testimony inadvertently betrayed that his real motive for opening the rear gate was nothing more than curiosity about whether the items behind the rear gate might be some type of contraband. When he was asked what kind of objects he was seeking to find there, he answered, "Weapons and contraband."

Here, the Dodge Magnum station wagon became an unoccupied vehicle after the officers removed, frisked and handcuffed both the driver and the only passenger. Merely because the officers allowed the handcuffed passenger to sit back down inside the vehicle, rather than have the passenger sit inside one of the Department vehicles present at the scene, did not convert an unoccupied vehicle into an occupied vehicle for search and seizure purposes.

As a Legal Bureau Bulletin¹ which discusses New York Court of Appeals decisions regarding vehicle searches concluded:

"(T)o enter and search an unoccupied vehicle the Court of Appeals has clearly stated that the officer must have probable cause that the vehicle contains a weapon, evidence of a crime or a means of escape. Reasonable suspicion alone is not sufficient."

The Respondent admitted that other than the driver's moving violations of performing an illegal U-turn and speeding (which the Respondent viewed as speeding off from the police), and other than the passenger's unwillingness to get out of the station wagon and his general belligerence, neither of the station wagon's occupants did anything to indicate that they were involved in any criminal activity, and nothing

¹ Vol. 22, No. 5 (November, 1992).

recovered from either the driver or the passenger when they were frisked indicated that they were involved in any criminal activity. The only other ground for suspicion offered by the Respondent was his unsupported testimony that “that model” (which he later changed to “this sort”) of vehicle had been used in late night convenience store armed robberies, although he did not know if any of these had been committed within the 105 Precinct.

Thus, the Respondent had an insufficient basis on which to form even a reasonable suspicion that the vehicle contained any contraband. As a result, the Respondent had no legal right to open the hatch gate and search the rear interior of the car for contraband.

Finally, the Respondent offered no other legal ground (such as the vehicle inventory search exception to the warrant rule) which could have justified his search. He testified that although the driver and the passenger had been detained and handcuffed, at the time he conducted his search they were not under arrest, and when he was asked whether he believed that the ESU officers intended to voucher the car, he answered, “That had not occurred to me one way or the other.”

Since the Respondent conducted a vehicle search which he knew, or should have known, was improper, the Respondent is found Guilty as charged.

PENALTY

In order to determine an appropriate penalty, the Respondent’s service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

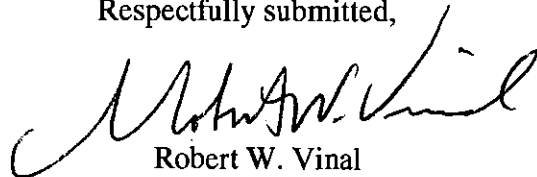
The Respondent was appointed to the Department on July 18, 1996. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has been found guilty of having abused his authority by wrongfully and without just cause searching inside a car without having the legal authority to do so.

In formulating a penalty recommendation, I have taken into consideration the brief and limited nature of the Respondent's improper vehicular search, the relatively minor intrusion into civilians' privacy interests that resulted from this search, and the Respondent's lack of any prior formal disciplinary record.

Therefore, it is recommended that the Respondent's penalty consist of a reprimand.

Respectfully submitted,



Robert W. Vinal

Assistant Deputy Commissioner - Trials

